UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

United States of America,

Plaintiff,

and

State of Minnesota, by its Attorney General Warren Spannaus, its Department of Health, and its Pollution Control Agency,

Plaintiff-Intervenor,

vs.

Reilly Tar & Chemical Corporation; Housing and Redevelopment Authority of St. Louis Park; Oak Park Village Associates; Rustic Oaks Condominium Inc.; and Phillips Investment Co.;

Defendants,

and

City of St. Louis Park,

Plaintiff-Intervenor,

vs.

Reilly Tar & Chemical Corporation,

Defendant.

No. Civ. 4-80-469

STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT REILLY TAR & CHEMICAL CORPORATION'S MOTION TO DISMISS THE COMPLAINTS OF THE INTERVENORS

INTRODUCTION

This suit has been brought by the United States of America on behalf of the Administrator of the United States Environmental Protection Agency under the provisions of § 7003 of the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. § 6973. On October 15, 1980, motions to intervene as plaintiffs filed by the State of Minnesota and the City of St. Louis Park

were granted. In complaints filed with their motions to intervene, the State and St. Louis Park alleged claims based on RCRA § 7003 as well as various state statutory and common law violations. This brief is filed on behalf of defendant Reilly Tar & Chemical Corporation ("Reilly Tar") in support of its Motion to Dismiss the Complaints of the Intervenors.

ARGUMENT

Neither RCRA § 7003 nor the federal common law of nuisance support the instant suit.

Both the State and St. Louis Park have asserted claims against Reilly Tar based on alleged "violations" of RCRA § 7003. See Complaint in Intervention of the State of Minnesota ("State Complaint") Count I; Complaint in Intervention of the City of St. Louis Park ("St. Louis Park Complaint") ¶ 24. As recently amended by the Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482 (Oct. 21, 1980), RCRA § 7003 provides:

> (a) AUTHORITY OF ADMINISTRATOR.--Notwithstanding any other provision of this chapter, upon receipt of evidence that the handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person contributing to such handling, storage, treatment, transportation or disposal, to stop such handling, storage, treatment, transportation, or disposal or to take such other action as may be necessary. The Administrator shall provide notice to the affected State of any such suit. The Administrator may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and the environment.
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> (b) VIOLATIONS.--Any person who willfully violates, or fails or refuses to comply with, any order of the Administrator under subsection (a) may, in an action brought in the appropriate United States district court to enforce such

order, be fined not more than $5,000 for each day in which such violation occurs or such failure to comply continues.

The Statement of Points and Authorities in Support of Defendant Reilly Tar & Chemical Corporation's Motion to Dismiss the Complaint of Plaintiff United States of America contains Reilly Tar's argument as to why the instant suit cannot be maintained against Reilly Tar by the United States under § 7003. This argument is equally pertinent to the § 7003 claims asserted by the State and St. Louis Park. According, for the reasons stated in the foregoing Statement of Points and Authorities and adopted by reference herein, the § 7003 claims of the State and St. Louis Park should be dismissed.

The foregoing Statement of Points and Authorities also contains the argument of Reilly Tar as to the inapplicability of the federal common law of nuisance to the instant suit. For the reasons stated therein and here adopted by reference, any claim of the State or St. Louis Park construed as resting upon the federal common law of nuisance should also be dismissed.

The remaining claims are based on state law and should accordingly be dismissed.

The remaining claims asserted by both the State and St. Louis Park allege public nuisance (State Complaint Count II; St. Louis Park Complaint ¶ 27), violation of state pollution control statutes and rules (State Complaint Count IV; St. Louis Park Complaint ¶ 25), strict liability (State Complaint Count IV; St. Louis Park Complaint ¶¶ 26, 29-30), negligence (State Complaint Count V; St. Louis Park Complaint ¶ 28), and damage to property rights (St. Louis Park Complaint ¶ 31). St. Louis Park

has also asked the court to render declaratory judgment on an agreement between it and Reilly Tar (St. Louis Park Complaint ¶¶ 32-35). All of these claims are based on state law and accordingly are cognizable only under this court's pendent jurisdiction.

At first blush it may appear that this court has diversity jurisdiction under 28 U.S.C. § 1332 over the state law claims asserted against Reilly Tar by St. Louis Park. St. Louis Park has asserted as much in its Complaint, St. Louis Park Complaint ¶ 3, apparently believing such jurisdiction existed because it chose to name only Reilly Tar as a defendant. Both the United States and the State, however, correctly recognized that such additional defendants as the Housing and Redevelopment Authority of St. Louis Park, Oak Park Village Associates, Rustic Oaks Condominium Inc. and Philips Investment Co., owners after Reilly Tar of parts of the site in question, were necessary parties under Fed. R. Civ. P. 19. Because these entities all exist under the laws of Minnesota, as does St. Louis Park, their required addition into the St. Louis Park suit against Reilly Tar would destroy any apparent jurisdiction based on the requisite complete diversity of citizenship. Thus, the state law claims of St. Louis Park, as well as those of the State, are cognizable only under this court's pendent jurisdiction.

With the dismissal of the original federal action into which the State and St. Louis Park intervened, the intervenors' claims should be dismissed as well. Their federal law claims fail along with those asserted by the United States, and the pendent state law claims should not

then be entertained. "Absent the pending actions, this Court would not consider Plaintiff-intervenor's claim, and therefore upon dismissal of the pending action it should not do so." Providence Health Centers, Inc. v. Matthews, 81 F.R.D. 537, 538 (D.R.I. 1979). "Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966). See, e.g., Taggart Corp. v. Life & Health Benefits Administration, Inc., 617 F.2d 1208, 1212 (5th Cir. 1980); Daniels v. All Steel Equipment, Inc., 590 F.2d 111, 114 (5th Cir. 1979); Sigmon v. Poe, 564 F.2d 1093, 1096 (4th Cir. 1977); Broderick v. Associated Hospital Service of Philadelphia, 536 F.2d 1, 8 n.25 (3d Cir. 1976); Bailey v. Lally, 481 F. Supp. 203, 205 n.2 (D. Md. 1979); Welch v. Bd. of Ed. of Baltimore County, 477 F. Supp. 959, 961 (D. Md. 1979); Zwetchkenbaum v. Operations, Inc., 165 F. Supp. 449 (D.R.I. 1958). This is the procedure which other federal courts have followed where pendent state claims remained after dismissal of the main action in a federal environmental lawsuit. See City of Evansville v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008, 1021 (7th Cir. 1979), cert. denied, 444 U.S. 1025 (1980); Ancarrow v. City of Richmond, 600 F.2d 443, 448 n.5 (4th Cir.), cert. denied, 444 U.S. 992 (1979); United States ex rel. Scott v. United States Steel Corp., 356 F. Supp. 556, 560 (N.D. Ill. 1973).

In addition to the foregoing, principles of sound judicial administration dictate that the complaints of these intervenors should be dismissed along with the dismissal of the federal suit. Both the State and

St. Louis Park are currently plaintiffs in a suit against Reilly Tar now pending in state court in Minnesota which involves the same facts and allegations as the instant action. See State of Minnesota and City of St. Louis Park v. Reilly Tar & Chemical Corporation, No. 670767 (Hennepin County Dist. Ct.). "[P]endent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims . . .." United Mine Workers v. Gibbs, supra, 383 U.S. at 726 (footnote omitted). While it might make juridical sense to allow the State and St. Louis Park to be intervenors in a pending federal suit, allowing these intervenors to remain after the dismissal of that suit would be tantamount to allowing the plaintiffs in a state court proceeding to remove that action to federal court. This would violate the rule that only a defendant may remove a case. C. Wright, Federal Courts, § 40, p. 160 (ed ed. 1976). "Having turned in the first instance to the state court, Plaintiff-intervenor[s] must look to that court for [their] judgments." Providence Health Centers, Inc. v. Matthews, supra, 81 F.R.D. at 538.

CONCLUSION

The complaints of the intervenors, the State of Minnesota and the City of St. Louis Park, should be dismissed.

Dated: December 19, 1980.

Respectfully submitted,

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